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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 1341

MICHAEL LOUIS BEHR, COURTENAY LUCILE NORTH and PAULINE MARIE STEVENS,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioners were convicted of a violation of Section 311.6 of the Penal Code of the State of California, which provides as follows:

> Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or

before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor.

Petitioners waived trial by jury and were tried by the court. Following imposition of sentence an appeal was taken to the Appellate Department of the Superior Court of the State of California, which court is the court of last resort in the State of California for misdemeanor violations. The Appellate Department of the Superior Court of the State of California affirmed the judgment without opinion. Petitioners neither petitioned the Appellate Department of the Superior Court of the State of California for a rehearing nor certification to the District Court of Appeals of the State

of California. Either of said petitions, if granted, would have resulted in further review on the state level.

STATEMENT OF THE EVIDENCE

On July 23, 1971, at 10:00 p.m., Los Angeles Police Office Joseph Stanley went to the All American Girl Bar at 5901 Melrose in the City of Los Angeles (R.T. p. 9, line 9). When Stanley entered, he observed appellant Behr behind the bar. Behr was giving change to a customer who had a glass of beer. Behr was hollering at customers to "kick into" the girl so she would dance and also to spend a little money on the juke box. Appellants North and Stevens were wearing only bikini bottoms (R.T. p. 12, lines 1-28). Behr also was operating a movie projector (R.T. p. 14, lines 9-11).

North went up on the stage and danced to music from the juke box (R.T. p. 15, line 9). Behr, behind the bar, was hollering in a loud voice "Somebody give [North] a dollar and she'll do her thing for you. Give Corky a dollar and she'll do her special dance for you." (R.T. p. 16, lines 4-10).

North then removed her bikini bottoms and was nude (R.T. p. 16, lines 12-14). A male put a dollar bill in front of North (R.T. p. 17, lines 2-5). North smiled, clapped her hands and shouted "all right" as she was looking at the male. She moved the dollar aside and went down on her back, raising her knees up and exposing her vaginal area directly to the male (R.T. p. 18, line 22 to p. 19, line 6).

North began to move the lower part of her body, especially the vaginal area, towards the customer and back in a rotation-type method (R.T. p. 19, lines 13-17).

After 30 to 45 seconds she raised her left leg straight up. Her right leg was off at an angle. This position exposed her vagina directly to the male who gave her the dollar (R.T. p. 20, lines 16-28). The only part of her body that was moving was her vagina. The male was three to four feet from North looking directly at her vagina (R.T. p. 21, lines 1-15).

North then went into a squat position. Her legs and vagina were spread apart. She began an in and out motion with the lower

portion of her body directing it at the customer (R.T. p. 22, lines 1-4). The lips of her vagina were moving in and out (R.T. p. 24, lines 18-21).

Appellant Stevens was on the stage nude. A male put a dollar into a pitcher. Stevens pushed the pitcher aside and got into a squat position in front of the male with her vagina exposed. Stevens stared directly at the male and began to move the lower part of her body in and out (R.T. p. 26, lines 23-25). Stevens was one and a half feet away from the male with the lips of her vagina spread apart (R.T. p. 27, lines 5-9).

Stevens was squatted over a spotlight. The male turned the spotlight on the vagina (R.T. p. 27, lines 16-22). Stevens stayed in the "spotlight area" for 30 seconds, continuing an in and out motion with the lower part of her body and vagina. She stepped back and waving her hand in front of her vagina stated "Boy, it's hot down there." (R.T. p. 28, lines 12-18).

Stevens got into a second squat position. She spread her legs exposing her vagina. She placed her fingers on each side of the

vagina. She spread her vagina apart. She moved the lower part of her hips (R.T. p. 29, lines 11-21).

During the above, appellant Behr was seating patrons, checking identifications, encouraging patrons to drink so they could go home drunk to the old lady, encouraging patrons to "tip" in order to get a special performance and encouraging patrons to chip into the juke box (R.T. p. 30, lines 21-22).

Behr was also telling patrons not to worry as the films would be back on. He stated that "I have the best hard-core in L.A. The only people that have any better is L.A.P.D. and they get theirs from me." (R.T. p. 31, lines 20-22).

Henry J. Petroski testified as an expert regarding contemporary community standards and appeal to prurient interest. He had conducted extensive interviews throughout California to determine what the average person felt goes substantially beyond customary limits of candor (R.T. p. 63, lines 21-25). The interviews were conducted in 36 counties and 95 cities in California (R.T. p. 64, lines 2-3).

In Petroski's opinion, the performances of North and Stevens were substantially beyond the customary limits of candor and the predominant appeal of the performances is to a prurient interest in sex and nudity (R.T. p. 83, lines 12-16).

The court determined that the conduct was not a dance. It was a display and manipulation of the genitalia with movements simulating sexual intercourse for the sole purpose of appealing to prurient interests of the audience. The court determined that the conduct went beyond customary limits of candor in the statewide community and it had no social redeeming value (R.T. p. 130, lines 6-13).

The court found sufficient evidence that appellant Behr participated as a principal, and aided and abetted North and Stevens. The court specifically found that Behr comes within the purview of Penal Code Section 311.6 (R.T. p. 130, lines 14-18).

I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE NO SUBSTANTIAL QUESTION OF FREE EXPRESSION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IS PRESENTED

Petitioners' reliance on Roth v. United States, 354 U.S. 476, and Jacobellis v. Ohio, 378 U.S. 184, is misplaced, inasmuch as it assumes that the vulgar display of a female's private parts, under a spotlight, for money, is some form of speech or expression. The facts in this case clearly demonstrate that Petitioners were not engaging in any form of speech.

The performance of a dance, like other forms of expression or communication, prima facie enjoys protection, in California, under the First Amendment of the Constitution of the United States. In re Giannini, 69 Cal.2d 563, 567. However, mere nudity in a public place is not entitled, in California, to the prima facie protection of the First Amendment of the United States Constitution unless embodied in a play or dance. Barrows v. Municipal Court, 1 Cal.

3d 821, In re Giannini, 69 Cal.2d 563, see also, Justice Douglas' dissent in Roth v. United States, 354 U.S. 476, 512. Respondent submits that the conduct of Petitioners was not dancing or any other form of expression or communication.

II

THE CONDUCT INVOLVED IN THE WITHIN CASE IS OBSCENE AND IS NOT CONSTITUTIONALLY PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioners' argument that the conduct in this case is not obscene, and is protected by the First Amendment of the United States Constitution, assumes that said conduct was some form of expression or communication, although it remains unarticulated just how this conclusion is reached. Assuming, arguendo, that their conduct is prima facie protected, the evidence presented demonstrated that it was obscene.

The California definitions regarding obscenity follow the rulings of the United States Supreme Court. "Obscene Live Conduct" is defined as follows:

"Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant

sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

California Penal Code
Section 311(g)

Penal Code Section 311.6 was enacted as a result of Barrows v. Municipal Court (1970) 1 Cal.3d 821, which held that Penal Code Section 647(a) [Lewd Conduct] was not a proper vehicle for the prosecution of obscenity occurring in a play, and In re Giannini (1968) 69 Cal.2d 563, which held that a nude dancer, in order to be convicted of violating Penal Code Section 314.1

[Indecent Exposure] must be prosecuted under "obscenity" standards. Petitioners should not be heard to complain that they should have been prosecuted under less restrictive statutes, and, in any event, the People still would have had the burden imposed by In re Giannini, supra. Merely because the People prosecuted Petitioners under Section 311.6 does not mean that the People thereby conceded that Petitioners' conduct was prima facie protected any more than it necessarily means that the People were desirous of affording Petitioners the greatest amount of protection under the law.

All of the cases cited by Petitioners involved subject matter which had in some way been memorialized, either on film or in print, prior to its exhibition. The subject matter of the present case involves obscene live conduct. Nevertheless, there is no reason why live conduct cannot be readily judged by the same standards, keeping in mind that live conduct, with the extremely close customer contact shown in this case, can vary from performance to performance, can result in much more

serious law enforcement problems, and would seemingly have a greater impact on the public exposed to it.

The essence of Petitioners' argument as to nonobscenity of their conduct is that mere nudity, absent graphic depiction of sexual activity, cannot be held obscene; that only "hard core pornography" can be considered legally obscene. Although this is somewhat of a simplification of the rationale of recent Supreme Court cases, Respondent submits that in cases of obscene live conduct, the circumstances of production, presentation and exhibition are more significant than in cases dealing with books, magazines and films. The actions and statements of petitioners, in the setting in which they occurred, speak for themselves as to the obscenity, and refute any contention of expression or communication.

In any event, Petitioners' theory cannot help them under the facts in this case: for the price of a dollar, Petitioners North and Stevens would squat and lie down, one to four feet from their customers, who could then turn a spotlight on Petitioners'

exposed private parts. Petitioners would spread their legs, spread their vaginas apart with their hands, and manipulate their genitalia with movements simulating sexual intercourse, all to the enthusiastic supervision and soliciting of Petitioner Behr.

Somewhat superfluously, the People produced expert testimony, which was uncontradicted by Petitioners, that the conduct went substantially beyond customary limits of candor and that the predominant appeal of the performances was to a prurient interest in sex and nudity.

Respondent submits that Petitioners' attempt to equate their performances with nudist and "girlie" magazines held not obscene is weak and unconvincing; instead, in this situation Petitioners' conduct was clearly obscene.

III

CALIFORNIA PENAL CODE SECTIONS 311.6 AND 311(g) ARE NOT UNCONSTITUTIONALLY VAGUE, AMBIGUOUS AND UNINTELLIGIBLE

It should be noted that Petitioners attack in this regard is also directed at California Penal Code Section 311(a) [Definition of "Obscene Matter"], yet this statute is not involved herein; it is applicable only in prosecutions under California Penal Code Section 311.2 [Sale or Distribution, etc., of Obscene Matter]. For this reason, Respondent will not discuss Section 311(a) herein.

Petitioners also say nothing in support of their contention that Section 311.6 is vague, ambiguous and unintelligible, and it does not appear so to Respondent. Rather, Petitioners limit themselves to an attack on Section 311(g), which is California's legislative enactment of the rule of Roth v. United States, 374 U.S. 476.

Petitioners, while "not unmindful" of the court's decision in Roth v. United States, implicitly recognize that Section

311(g) is not vague, ambiguous or unintelligible. Rather, Petitioners complain that they experience great difficulty in dealing with the court's opinion. Respondent submits that such does not render the court's opinion vague, ambiguous, or unintelligible; there are other, more obvious reasons, for Petitioners' difficulty.

It is unlikely that any opinion of any court, dealing with First Amendment problems, will ever answer all the questions in all the future cases; rather, First Amendment cases should raise difficult questions, and should require the utmost thought and careful consideration from judges and lawyers.

IV

CALIFORNIA PENAL CODE SECTION 311.6 IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DOES NOT DENY PETITIONER BEHR THE EQUAL PROTECTION OF THE LAWS

Petitioner Behr argues that since California Penal Code Section 311.2(b) provides

that a motion picture operator or projectionist employed by a person licensed by the City, who is acting within the scope of his employment, cannot be convicted of exhibiting obscene matter, an analogous provision should exist for a manager of a public place wherein obscene live conduct is presented.

Section 311.2(b) has been construed to exempt only a bona fide projectionist whose activities are limited strictly to operation of a movie projector. By performing other functions, such as supervising the operation of business, collecting admissions, etc., a "projectionist" loses the exemption. People v. Stout, 18 Cal.App.3d 172.

Even if a similar exemption existed under Section 311.6, Petitioner Behr would not benefit, since the evidence showed he was the manager; he seated patrons, checked identifications, encouraged patrons to drink, and solicited patrons to pay Petitioners North and Stevens a dollar in order that they might obtain a personal exhibition of the obscene live conduct.

Petitioner cites no case and offers no

theory in support of his proposition. Section 311.2(b) is obviously intended to relieve bona fide projectionists, who are invariably union craftsmen with no particular interest in what is being projected, from becoming the censors for the movie industry, an area obviously outside their competence. In every prosecution of a person under Section 311.2 or 311.6, the People must show the requisite degree of scienter and criminal intent; Respondent submits that such was amply demonstrated as to Petitioner Behr. If the degree of involvement of Petitioner Behr had merely been to an extent similar to a bona fide projectionist under Section 311.2(b); that is, if he had merely checked identifications and shown patrons to their seats, for example, he obviously couldn't have been successfully prosecuted. Section 311.6 specifically applies only to those who actually engage or participate in, or who manage, produce, sponsor, present or exhibit obscene live conduct. Therefore, one must be directly involved.

V

THE SUPREME COURT OF THE UNITED STATES SHOULD NOT TAKE JURISDICTION TO REVIEW A JUDGMENT WHERE NO OPINION WAS DELIVERED BY THE HIGHEST STATE COURT

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said appellate court therefore did not in any way pass upon any federal questions.

The appellate jurisdiction of the United States Supreme Court over a state court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court. Cincinnati, N.O. & T.P.R. Co. v. Slade, 216 U.S. 78.

Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Steinbridge v. State of Georgia, 343 U.S. 541.

CONCLUSION

The questions raised here appear to be most similar to those presented to this Court in No. 71-1282, Gianone v. California, Petition for Writ of Certiorari denied May 22, 1972 (40 L.W. 3556).

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioners' rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or decided a federal question of substance not heretofore determined by this Court.

There appears in this case no reason, either in law or in good conscience, why the petition should be heard or granted without first having the highest court of the State of California express its opinion on the questions here raised. The matter should be dismissed.

Respectfully submitted,

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